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IN THE

Supreme Court of the United States

October Term, 1967
No. 611

DAVID RABECK,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal From the Appellate Term of the Supreme Court of the State of New York, First Department.

JURISDICTIONAL STATEMENT.

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IN THE

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October Term, 1967

No. .....

DAVID RABECK,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal From the Appellate Term of the Supreme Court of the State of New York, First Department.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment rendered by the Appellate Term of the Supreme Court of the State of New York for the First Department on June 15, 1967 which affirmed appellant's conviction by the Criminal Court of the City of New York, County of Bronx, for violation of Penal Law §484-i, and submits this Statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below.

At the conclusion of appellant's trial, the three-judge court rendered a written opinion denying appellant's motion to acquit and finding appellant guilty [R. 33-34][1]

[1]The reference "R" is to the transcript of the record prepared and certified by the Clerk of the court below and on file in this Court.

A copy of the opinion, which is unreported, is attached hereto as Appendix A.

The judgment of conviction was affirmed [R. 49-50] in the Appellate Term of the Supreme Court of the State of New York for the First Department by a divided court. No opinion was rendered by the majority, but a dissenting opinion was rendered by Judge Markowitz. A copy of the said dissenting opinion, which is unreported, is attached hereto as Appendix B.

A due and timely application for permission to appeal to the Court of Appeals of the State of New York was denied by the Honorable Stanley H. Fuld, Chief Judge of said court [R. 51]. Copy of the certificate denying leave to appeal is attached hereto as Appendix C.

Jurisdiction.

Appellant was convicted of the crime of selling two magazines, to wit, "Snip", Vol. 2, No. 8, and "Trojan", Vol. 3, No. 4, to a person under the age of eighteen years, in violation of Penal Law §484-i. The conviction was had in the Criminal Court of the City of New York for the County of Bronx before a court of three judges, without a jury. Appellant was sentenced by a divided court to six months in the workhouse, which sentence was suspended, one Judge dissenting and voting for a straight six months sentence [R. 39-40]. Appellant is not now in custody or at large on bail.

The judgment of conviction was affirmed by the Appellate Term of the Supreme Court of the State of New York for the First Department on June 15, 1967 by a divided court [R. 49-50]. A copy of the said judgment is attached hereto as Appendix D.

Leave to appeal to the Court of Appeals was denied by the Honorable Stanley H. Fuld, Chief Judge of the Court of Appeals for the State of New York on June 23, 1967 [R. 51, Appendix C].

The Notice of Appeal was filed [R. 52-54] in the Criminal Court of the City of New York for the County of New York, the court possessed of the record herein, on July 25, 1967.

The statutory provision which confers jurisdiction of the appeal upon this Court is 28 U.S.C. §1257(2). The following cases sustain the jurisdiction of this Court to review conviction of appellant by appeal: *Winters v. New York*, 333 U.S. 507; *Smith v. California*, 361 U.S. 147; *Memoirs v. Massachusetts*, 383 U.S. 413.

Questions Presented.

1. Does Penal Law §484-i violate appellant's right to due process under the Fourteenth Amendment to the Constitution of the United States on the ground that said statute is too vague and unduly restricts freedom of expression and of the press?

2. Does Penal Law §484-i, as construed and applied to persons under the age of eighteen years, abridge freedom of speech and of the press in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was appellant's right to due process under the Fourteenth Amendment to the Constitution of the United States violated because there was no proof that appellant knew the character of the material sold?

4. Was the appellant's right to due process under the Fourteenth Amendment to the Constitution of the

United States violated because there was no proof that appellant knew that the material sold came within Penal Law §484-i?

5. Was the appellant's right to due process under the Fourteenth Amendment to the Constitution of the United States violated because there was no proof that appellant knew that the purchaser was under eighteen?

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of §484-i, of the New York Penal Law are annexed hereto as Appendix E.

Statement of the Case.

The Information returned against appellant charged a violation of §484-i of the Penal Law [R. 5]. It was alleged that on December 8, 1965, at a candy store located in the County of Bronx, State of New York, appellant sold to a named person, "a person actually and apparently under the age of 18 years, to wit 16 years of age" two specified magazines. It was alleged that at the time of the purchase, the purchaser showed the magazines to appellant and appellant accepted the purchase price.

The Information also charged that the magazines contained pictures of nude females "revealing the breasts and buttocks uncovered" and "depicted and shown in such a posture or way" that the viewer's attention or concentration "is primarily focused" on the aforesaid areas, and that this "would appeal to the lust of persons under the age of 18 years or to their curiosity as to sex or to the anatomical differences between the sexes".

The Information further alleged that the specified magazines also contained "printed matter of narrative accounts of sexual behavior which are harmful to minors".

Finally, it was charged in the Information that at the time of the sale, appellant knew of the character and content of the aforementioned material and/or failed to exercise reasonable inspection which would have disclosed the character and content of the material.

The case came on for trial on June 23, 1966 before a three-judge court, without a jury, in the Criminal Court of the City of New York for the County of Bronx. The prosecution offered as a witness John Kelly [R. 8], who testified that he was seventeen years of age at the time of the trial [R. 9]. A birth certificate offered into evidence by the prosecution showed that the witness was born on March 6, 1949 [Ex. 1, R. 9], so that the witness was slightly less than seventeen years of age when he purchased two magazines at a candy store located in the County of Bronx on December 8, 1965 [R. 10]. The witness went to a rack which contained "girly magazines" and selected two, to wit, "Snip" and "Trojan" [R. 10-11]. The witness went to the counter and held the two magazines up with the names showing to appellant [R. 11]. At the same time, the witness handed appellant $3.00, which was the price of the two magazines. Appellant took the money and the witness left the store [R. 11]. The period of time consumed in holding up the magazines as aforestated was "from five to ten seconds" [R. 15].

On cross-examination, the witness stated that he had never been in this particular store before and that he had not gone to buy the magazines for himself [R.

16-17]. The witness stated that he "felt that by buying these magazines, if I could get a conviction under this law, I could make some kind of civic contribution, help clean up the city" [R. 17]. An objection by the prosecution to a question by counsel for appellant as to whether the witness was assisting an operation known as Yorkville was sustained [R. 17].

On further cross-examination, the witness stated that after he took the magazines he did not look inside them at any time and that he never intended to [R. 17-18].

In answer to a question by a member of the Court, the witness testified that he spent three to four minutes in the particular shop [R. 20]. The witness further testified, in answer to an inquiry by the Court, that the establishment contained a soda fountain where candy and cigarettes were sold, and that magazines of all kinds were also available, a majority of which were "regular magazines" as distinguished from girlie-type magazines [R. 22]. The witness described the premises as a luncheonette or candy store [R. 22-23].

Another witness merely testified that by pre-arrangement with the witness Kelly he had previously entered the store and seated himself at the counter where he had a soda [R. 23-25]. The sum total of his testimony was merely that he saw the witness Kelly select the magazines, pay the money across the counter and saw appellant take the money [R. 24]. At the time of the purchase, appellant "didn't say anything" [R. 24].

The aforesaid was the People's case [R. 25].

How Federal Questions Are Presented.

Following the conclusion of the People's case, appellant moved to dismiss upon the grounds that, first, Penal Law §484-i is unconstitutional "in violation of the

due process clause of the 14th Amendment" as a restriction on "freedom of expression"; second, because there had been no proof of scienter; third, that the circumstances did not indicate a real sale under the statute, there being no intention on the part of the witness ever to really use the magazines; and, finally, on the ground that Penal Law §484-i had been repealed by Penal Law §484-h,[2] which set forth highly different standards and that it would be a denial of due process to have two statutes on the books both applicable to the sale of the magazines herein involved under entirely different standards [R. 25-26].

By a majority vote of the three-judge court, the said motion to dismiss was denied. Judge Bloom dissented and would have voted to grant the motion based on the opinion previously rendered by Judge Bloom "in People against Kaplan [44 Misc. 2d 110] as corroborated subsequently by the Court of Appeals in People against Kahan [15 N.Y. 2d 311]" [R. 29-30]. Following the aforesaid denial of the motion to dismiss at the conclusion of the People's case, appellant rested, and renewed his motion to dismiss with the "additional ground that the information should be dismissed because the People have failed to prove defendant's guilt beyond a reasonable doubt" [R. 30]. Decision was reversed on the aforesaid motion [R. 30].[3]

On January 25, 1967, the three-judge court rendered a memorandum opinion denying the motion to acquit

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[2]Appellant is annexing hereto as Appendix F the provisions of the said Penal Law §484-h.

[3]At the time, the case of *People v. Tannenbaum* had been argued and briefed in the Court of Appeals and decision was pending. See, *People v. Tannenbaum*, 18 N.Y. 2d 268, 274 N.Y.S. 2d 131, 220 N. E. 2d 783, appeal dismissed 388 U.S. ...., 87 S. Ct. 2107.

and finding the appellant guilty (Appendix A). The Court held that the issue as to whether or not Penal Law §484-i was "too vague and indefinite to meet the constitutional standard of 'due process'" had been settled by the decision of the Court of Appeals in *People v. Tannenbaum*, 18 N.Y. 2d 268, and *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71. In addition, it was decided that since *Tannenbaum* held that constitutional standards require scienter "only as to the contents of the publication" and "not of the age of the purchaser", the People had established beyond a reasonable doubt "all that the statute requires them to prove" [R. 5, 33-34].

On the same day, appellant, by a divided court, was sentenced to six months in the workhouse, execution of which was suspended, one Judge dissenting and voting for a straight six months sentence [R. 39-40].

The judgment of conviction was affirmed in the Appellate Term of the Supreme Court of the State of New York for the First Department by a divided court on June 15, 1967 [Appendix D, R. 49-50], Judge Markowitz dissenting [Appendix B, R. 49-50]. Judge Markowitz was of the opinion that the record failed to show any evidence of knowledge by appellant to establish scienter.

On June 23, 1967, Chief Judge Fuld of the Court of Appeals of the State of New York denied leave to appeal [Appendix C, R. 51]. On the said application, the appellant urged "that section 484-i of the Penal Law was vague, contrary to the requirements of due process as guaranteed by the Fourteenth Amendment" and that "the proof of scienter was insufficient under the due process clause of the Fourteenth Amendment" [R. 51].

The notice of appeal to this Court [R. 52-54] was filed on July 25, 1967.

The Federal Questions Presented Are Substantial.

1. The entire New York statutory scheme is unconstitutionally vague, uncertain and broad. The provisions of Penal Law §484-i are so broad in their sweep, so vague and indefinite in their definitions and characterizations of prohibited activity, that they fail to meet the most minimal standards of the First and Fourteenth Amendments.

The statute punishes "any person" who sells written or pictorial matter to a person "actually or apparently" under the age of eighteen years. The first section of the statute deals with magazines and other material which depict, among other things, persons of "the age of puberty or older", with less than "a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than a fully opaque covering of any portion of the breast below a point immediately above the top of the areola".

The second section of the statute punishes the sale to a person actually or apparently under the age of eighteen years of any collection of photographs or similar representations of any person of the age of puberty or older where the depiction or showing is "in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts".

The third section of the staute proscribes the sale in similar fashion of any book or other material containing "details, descriptions or narrative accounts of", among other things, "the genitals in a state or condition of sexual stimulation or arousal".

All such representations and descriptions as aforesaid are punishable if they are written or presented "in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes". The statute adds that such details, descriptions or narrative accounts are to be distinguished from "flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks".

The statute has no requirement that the seller have knowledge of the age of the purchaser. In this respect, the seller is held strictly liable. The statute defines "knowingly" as meaning knowledge of the content and character of any item described in the statute, or "failure to exercise reasonable inspection" which would disclose the character and content of the item.

This Court has stated that vague laws in any area suffer a constitutional infirmity. *Ashton v. Kentucky*, 384 U.S. 195, 200. This is so because "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law". *Baggett v. Bullitt*, 377 U.S. 360, 367. However, when First Amendment rights are involved, "we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer", *Ashton v. Kentucky*, 384 U.S. at 200. Provisions of a statute which are completely lacking in "terms susceptible of objective measurement" require persons, at peril of their

life, liberty or property, to speculate as to the meaning of the law. Any penalty prescribed for violations of such law constitutes a denial of due process of law. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 286, 287. Finally, a statute which, by reason of its overbreadth, threatens prosecutions of protected expression is as violative of the Due Process Clause as unduly vague, ambiguous and uncertain statutes in the free speech and press areas. Such statutes create a "danger zone" within which expression normally protected from governmental infringment may be inhibited. *Dombrowski v. Pfister,* 380 U.S. 479, 494.

The vice of all overbroad and vague statutes is that it vests unfettered discretion in officials as well as judges and juries to create their own standards in each case; such standards result in a continuous and pervasive restraint on all expression, result in that "chilling effect" which the First Amendment was entitled to prevent.[4]

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[4]In the free speech and press area, the following statutory standards have failed to meet the constitutional tests: ". . . publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; * * * advocates, advises or teaches the doctrine" of forceful overthrow of government (*Keyishian v. Board of Regents,* 385 U.S. 589); "any writing calculated to create disturbances of the peace . . ." (*Ashton v. Kentucky,* 384 U.S. 195, 198); ". . . assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization . . ." (*Dombrowski v. Pfister,* 380 U.S. 479, 493; *Baggett v. Bullitt,* 377 U.S. 360, 362-363); ". . . any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys" (*N.A.A.C.P. v. Button,* 371 U.S. 415, 433); "aid, support, advice, counsel or influence to the Communist Party" (*Cramp v. Bd. of Public Instruction,* 368 U.S. 278, 279); "obscene, indecent or immoral, or such as tend to debase or corrupt morals . . ." (*Holmby Productions, Inc. v. Vaughn,* 350 U.S. 870, reversing 177 Kan. 278, 282.

The statute here involved bristles with unconstitutional vagueness and overbreadth. It purports to affect persons who are actually or "apparently" under the age of eighteen years. It omits all requirements of scienter with respect to age. It thus places impossible burdens upon those who circulate the press with resultant self-censorship which may affect the access of adults as well as young people to constitutionally protected material. The key words in the statute, such as "appeal to the lust", or curiosity "as to sex" or to "anatomical differences" between the sexes, or narrative accounts in books of the genitals in a state or condition of "sex-

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P. 2d 412, 414 [1955]); "immoral and harmful, non-educational and harmful, non-amusing and harmful" (*Superior Films, Inc. v. Dept. of Education* [*Commercial Pictures Corp. v. Regents*], 346 U.S. 587, reversing 159 Ohio St. 315, 112 N.E. 2d 311, 319 [1953] and 305 N.Y. 336, 113 N.E. 2d 502 [1953]); "of such character as to be prejudicial to the best interests of the people of said city" *Gelling v. Texas*, 343 U.S. 960, reversing 157 Tex. Crim. 516, 247 S.W. 2d 953; "sacreligious" (*Jos Burstyn, Inc. v. Wilson*, 343 U.S. 495); "the massing of stories of bloodshed and lust in such a way as to incite to crime against the person" (*Winters v. New York*, 333 U.S. 507, 514); "injurious to public morals". (*Musser v. Utah*, 333 U.S. 95, 97. On remand, *State v. Musser*, 118 Utah 537, 223 P. 2d 193); "invoking or inciting others to breach of the peace" (*Cantwell v. Connecticut*, 310 U.S. 296, 303); "without a just cause or legal excuse . . . go near to or loiter about the premises" and "picket . . . for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another" (*Thornhill v. Alabama*, 310 U.S. 88, 99); "good character" and "absence of fraud" (*Schneider v. New Jersey*, 308 U.S. 147, 163); doctrines of a political party "which may be said to be ultimate resort to violence at some indefinte future time against organized government" (*Herndon v. Lowry*, 301 U.S. 242, 260); red flag "as a sign, symbol or emblem of opposition to organized government" (*Stromberg v. California*, 283 U.S. 359, 360); "malicious, scandalous and defamatory" (*Near v. Minnesota*, 283 U.S. 697, 701).

A statute may be deemed vague and overbroad when it indiscriminately classifies innocent with knowing activity. *Wieman v. Updegraff*, 344 U.S. 183; *Smith v. California*, 361 U.S. 147; *Elfbrandt v. Russell*, 385 U.S. 11. See also, *New York Times Co. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana* 379 U.S. 64. For cases involving vague statutes outside of the free speech and press areas, see, *Ashton v. Kentucky*, 384 U.S. 195, 200, n. 1.

ual stimulation or arousal", or 'posed or presented in such a manner as to exploit lust for commercial gain" are all inherently vague formulas or criteria for guiding either judicial interpretation or the behavior of retailers, distributors or publishers.

The word "lust" has been defined as meaning "Sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion. Longing or intense desire; eagerness to enjoy". Webster's *New International Dictionary* (2d Ed., unabridged). Margaret S. Ernst, author of *In a Word and More About Words*, explains the word "lustful" as follows: "Teutonic. Lust originally meant pleasure, delight. To long for. A lust-house was a country villa." See, Ernst and Schwartz, *Censorship: The Search for the Obscene* (1964) (inside cover).

The proscriptions of the statute can only result in the censorship of any visual presentation of the nude or partially denuded human figure or any writing containing a description of sex or sex relationships. The statute thus proscribes reproductions of great art works, The National Geographic Magazine, *Gulliver's Travels* and a host of other significant material which may be deemed to arouse sexual desires or appeal to a curiosity as to sex or to anatomical differences between the sexes. See, *People v. Kaplan*, 44 Misc. 2d 110, 113; Kenneth Clark, *The Nude* (1959), 29, 204, 421, 444.

New York made its initial attempt to proscribe written and visual materials for young persons in 1955 with the enactment of a statute which made it a misdemeanor to knowingly distribute to persons under the age of eighteen books, the cover or contents of which

was principally made up of descriptions of illicit sex or sexual immorality or which was obscene, or which consisted of "nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain". New York Penal Law, §484-h, Laws of New York 1955, Chapter 836.

In 1964 and in 1965, various sections of §484-h came before the Court of Appeals of New York with the ultimate result that the statute was held unconstitutional in its entirety. In *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 20 N.E. 2d 14, 252 N.Y.S. 2d 433 (1964), the book *Memoirs of a Woman of Pleasure* [*Fanny Hill*] had been sold to a minor under eighteen years of age. Conviction of the defendant had been obtained under the section which punished the sale of a book whose contents was devoted to descriptions of illicit sex or sexual immorality. Pointing to the decision of this Court in *Winters v. New York*, 333 U.S. 507, the Court held that the words contained in the statute were either too vague to apprise possible defendants of what they mean or too overbroad so as to forbid all publications or pictures mainly devoted to those subjects (14 N.Y. 2d at 417-418). In *People v. Kahan*, 15 N.Y. 2d 311, 206 N.E. 2d 333, 258 N.Y.S. 2d 391 (1965), another attempt to save other provisions of the law was equally unsuccessful.

In 1965, New York enacted two laws purportedly designed to protect minors. The first was a new §484-h (Laws of New York 1965, Chapter 327, effective September 1, 1965; Appendix F). The statute appears to be an adoption of the concept of "variable obscenity" defining material "harmful to minors" in terms of ap-

peal to the prurient interest to minors, community standards with respect to suitable material for minors and utterly without redeeming social importance for minors.

Penal Law §484-i (Laws of New York 1965, Chapter 372, effective July 1, 1965; Appendix E), the statute here involved, is not an obscenity statute. It is a statute which ostensibly invokes the power of the State to outlaw material for young persons which is ordinarily protected from governmental infringment by the Constitution. This statute was upheld by a four to three decision of the Court of Appeals of New York in *People v. Tannenbaum,* 18 N.Y. 2d 268, 274 N.Y.S. 2d 131, 220 N.E. 2d 783 (1966).

Judge Keating, writing for the majority, recognized the vagueness and overbreadth of the provisions of the the law, but felt that the phrase "posed or presented in such a manner as to exploit lust for commercial gain" gave the statute a clear meaning. Chief Judge Fuld, writing for the minority, observed that the statute offended essential guarantees since it punished the distribution of constitutionally protected expression and that §484-i contained the same defects "in respect of its substantive definitions" as had led the Court to invalidate the old §484-h enacted in 1955. Chief Judge Fuld observed (18 N.Y. 2d at 276):

> ". . . These criteria, standing by themselves, are patently insufficient and impermissible predicates for penal liability. Quite apart from the fact that the statute would improperly cover both married teenagers and children of tender years (cf. *Griswold v. Connecticut,* 381 U.S. 479, 485-486), it would indiscriminately punish the dissemination of

material that stimulates healthy, as well as morbid, curiosity about sex and sexual differences. Taken literally, the provision would outlaw every course in sex education and feminine hygiene taught in the schools and would bar access by children to reproductions of, for example, the paintings by Michelangelo in the Sistine Chapel as well as the works of other great masters. . . ."

With respect to the argument of the majority that the statute was somehow saved by the requirement that the material be presented in such a manner as to exploit lust for commercial gain, Chief Judge Fuld observed that while this Court had held that the manner in which a work was sold might have some bearing on determining the question of obscenity "in close cases", such conduct did not deprive publications or other works which are not questionable of their constitutional protection (18 N.Y. 2d at 276). See, *Ginzburg v. United States,* 383 U.S. 463, 474. See also, *Redrup v. New York,* 386 U.S. 767, 769. Moreover, Chief Judge Fuld noted that language upon which the majority relied was the very language contained in the old §484-h which the same Court had held unconstitutionally vague in *People v. Kahan.* In this respect, Chief Judge Fuld appears to be eminently correct. The language "written or presented in such a manner as to exploit lust for commercial gain" is clearly unconstitutionally broad and vague. The sale and presentation of genuine works of art and literature may easily fall within the ban of the statute. It is not clear from the law whether the prosecution would have to prove anything beyond the sale of the objectionable item because, apparently, any advertising or profit made would convert the sale into

"exploitation". See, *Smith v. California*, 361 U.S. 147, 150; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, n. 6; *New York Times Co. v. Sullivan*, 376 U.S. 254, 266. In short, the phrase "written or presented in such a manner as to exploit lust for commercial gain" does not in any effective manner restrict the breadth of the law; "the words themselves have no ascertainable meaning either inherent or historical". *Thornhill v. Alabama*, 310 U.S. 88, 100.[5]

The vagueness, overbreadth and ambiguity of the provisions of §484-i renders the statute, therefore, violative of the due process provisions of the First and Fourteenth Amendments. The statute fails to establish a clearly defined standard of guilt and is so irrationally drawn as to punish the sale of books, magazines and other communications which are clearly entitled to constitutional protection. See also, *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *Police Commissioner of Baltimore City v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727 (1960);

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[5]The appeal in *People v. Tannenbaum* to this Court was dismissed as moot (388 U.S. ....; 87 S. Ct. 2107), Chief Justice Warren and Justice Douglas dissenting and Justice Brennan voting to reverse. The same issue of mootness is not presented on the appeal herein, since the original sentence in this case was imposed on January 25, 1967 and the Court could order early argument. Moreover, it is submitted that the mootness issue in its broader aspects should be reconsidered by this Court. See the dissenting opinions of Chief Justice Warren and Justice Douglas in *Jacobs v. New York*, 388 U.S. ...., 87 S. Ct. 2098 and *Tannenbaum v. New York*, 388 U.S. ...., 87 S. Ct. 2107. In addition to the sanctions and stigma which may be placed upon the accused as the result of a conviction, the questions involved herein are of great public importance to the entire country. Approval by the highest court of the State of New York of the statute herein may lead to emulation by other states and create a multiplicity of litigation which a definitive ruling by this Court could avoid.

Paramount Film Dist. Corp. v. Chicago, 172 F. Supp. 69 (D.C. Ill. 1959).[6]

2. The statute here raises questions of substantial importance in the area of substantive due process as well as procedural due process. A statute which purports to proscribe the reading and viewing of juveniles requires, it is submitted, scrupulous scrutiny. The children of today are the adults of tomorrow, and the State which presumes to control the access of young people to art and literature dealing with sex must, it is submitted, exercise such awesome power within the limits of the Constitution. Young people, whatever their age, are clearly "persons" and the fundamental law provides that no person can be deprived of his liberty without due process of law. The exercise of freedoms of speech and press is presumably as much the right of persons under the age of eighteen as those above that age. See, *Pierce v. Society of the Sisters of the Holy Names etc.*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390.

Unless the so-called children's legislation is carefully appraised, there is danger that such laws may be used to restrain beneficial developments in literature and art for young people, in deference to unsupported notions about the "purity" of a young person's mind or his moral development. It should be noted that in the case herein two young men were used to act in a concocted scheme as informers, without any intention of

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[6]Issues similar to the ones involved herein but involving different statutes, are before this Court in *Ginsberg v. New York*, October Term, 1966, No. 1022 (388 U.S. ...., 87 S. Ct. 2108); *Interstate Circuit, Inc. v. Dallas*, October Term, 1966, No. 1109, and *United Artists Corp. v. Dallas*, October Term, 1966, No. 1155 *United Artists Corp. v. Dallas*, October Term, 1966, No. 1155 (387 U.S. 903). Probable jurisdiction was noted in all three cases.

using or reading the material which one of them purchased. The ready willingness of such young persons to accept governmental controls on speech and press hardly augurs well, it is submitted, for the development of that democratic spirit which characterizes the American way of life.

Problems of war, poverty, sex and a myriad of other social problems presently face the country and are problems for adults and young people alike. It is evident today that many segments of youth are endeavoring to deal with these problems honestly, without bitterness and without hyprocrisy. It is not helpful, it is submitted, under such circumstances, to emasculate the reading or viewing of young people by arbitrary standards and criteria which can only dwarf the mind and spirit. It is not meaningful to young people to find that the State makes accessible to them all literature and all viewing which deals with death and violence but which inhibits their normal sex instinct and curtails their knowledge with respect to sex and sex relations. Young persons reading the sensational divorce cases outlined in newspapers, viewing the myriad forms of advertising accompanied by sexual blandishments, and the daily fare of stories and plays depicted in television and motion pictures, would be hard put to understand the beneficial purpose of the statute herein involved. If there be such a thing as "contemporary community standards", it must be stated that those standards as imposed by the adult community would appear to approve the reading and viewing by juveniles of material which appeals to their "curiosity as to sex" or to the "anatomical differences between the sexes" or to their "sexual desires".

The standards of young people today with respect to the depiction and representation of sex and nudity are also far more candid than those of the past. Just as in the case of adults, care should be taken, it is submitted, that the reading or viewing of young persons should not be repressed or limited on a view that some highly susceptible child may in some manner be invidiously affected by the viewing of a nude or the reading of a story dealing with sex. That a causal relation exists between juvenile delinquency and exposure to books or magazines dealing with sex remains unproven. See, Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 49-104; *Commonwealth v. Gordon*, 66 D. & C. 101, 110 (Pa. 1949); *United States v. Roth*, 237 F. 2d 796, 812, 817 (2 Cir. 1956), concurring opinion of Judge Frank; *Memoirs v. Massachusetts*, 383 U.S. 413, 431, n.10; Note, "The New York Law Controlling the Dissemination of Obscene Materials to Minors", 34 Fordham Law Review 692, 693 (1966).

An attempt to limit the reading of young persons by proscribing books, magazines or other communications which may merely appeal to their sexual desires, or appeal to their curiosity as to sex or to the anatomical differences between the sexes, raises additional serious legal questions. In the first place, it must be assumed that all young people have sexual desires and have a normal curiosity about sex and the differences in the sexes. Most young people know that all human beings and all members of the animal kingdom have a sex life. Undoubtedly they are better off for having these normal curiosities and knowledge.

In the second place, commencing with the opposite sex, virtually every manifestation of life, whether it be

in the arts or literature or any other sphere, may appeal to a young person's curiosity as to sex or his sexual desires. Standards such as are contained in Penal Law §484-i, therefore, are not only irrational, since much that is left untouched will have the same forbidden appeal; but such standards operate only to deprive young persons of reading and visual matter which is their right to read and view and which may indeed be vital to them. The State, it is submitted, does not have the right to deprive young or old from representations of nudity which may appeal to their curiosity as to sex or the depictions of sex in books and other writings which may appeal to their longings for sex.

As a matter of substantive due process therefore, the statute here trenches upon areas of freedoms of speech and press beyond permissible constitutional limits.

In another respect the statute suffers from a similar constitutional infirmity. Appellant refers here to the age which the statute has prescribed wherein a person constitutes a "minor". That age is eighteen years. Such an age limit in the light of present-day standards would appear to be arbitrary and unreasonable. If a "children's" statute is to be enacted upon the theory that they must be protected from reading matter which appeals to their sexual desires or curiosity as to sex, then at the very least such a statute should make some rational distinction between those described as "children" and those who may be better described as "young adults".

It is submitted that it is unreasonable to place young people who will soon be facing the Draft and entry into the Armed Forces, or who are married and bringing

up a family of their own, into the same category as those young persons who have just passed beyond the age of puberty. Surely, the young adults who are today receiving their education in the diversified curriculums of the universities of the country, who are engaged in civil rights struggles and concerned with the serious social, political and economic problems of the day cannot rationally be placed in the same category as other young persons.

While the selection of any age limit will always be to some degree arbitrary, appellant suggests that the age limit for statutes involving the reading or viewing of matters dealing with sex should be limited to the age of sixteen in the light of constitutional requirements. In this connection, it should be noted that the maximum age requirements for compulsory school attendance is sixteen years in forty-one States of the Nation. Only five States have a maximum requirement of seventeen, and only four States a maximum of eighteen years. Steinhilber and Sokolowski, *State Law on Compulsory Education* 11, published by United States Department of Health, Education and Welfare, United States Government Printing Office, Washington, D.C. (1966). If a fairly general consensus exists in the country that young people over the age of sixteen need no longer be required to attend schools to obtain their education, then it seems reasonable that they should be treated, so far as their rights to read and view are concerned, on the same terms and conditions as all other adults in the community.

Finally, a statute such as the one involved herein, which does not purport to be an obscenity statute but which merely seeks to limit the reading and viewing of

matter which the State deems objectionable, should meet the constitutional requirement of "clear and present danger". Aside from the very narrow category of "obscene" material as defined and limited by this Court, the constitutional rule is that all discussion or representation of human problems in every area, including the area of sex and sex relations, is entirely free from governmental infringement, unless such discussion or representation creates a clear and present danger of a substantive evil which the State has a right to prevent. There appears to be no reason why the Due Process Clause of the Fourteenth Amendment, which obviously protects persons under eighteen as well as adults, should not be applicable to all material which is not obscene.

3. On the issue of scienter, the statute here raises questions of critical constitutional importance. The State omits any requirement of scienter as to age on the part of the bookseller. He is made absolutely responsible for the sale of any book or magazine defined by the law to a person under the age of eighteen. In *People v. Tannenbaum, supra,* a majority of the Court held that such a statute imposing strict liability was constitutionally permissible since, as Judge Keating put it, "the number of situations in which such inquiry will be necessary will be quite few". The opinion was expressed by Judge Keating that "the eye of experience easily perceives the difference between an infant and an adult", from which it followed that the burden of the statute would not unduly restrict the dissemination or receipt of constitutionally protected material (18 N.Y. 2d at 274-275).

In his dissenting opinion, Chief Justice Fuld noted that the Court had previously held with respect to the old §484-h, that a scienter requirement with respect to age was indispensable in the statute (18 N.Y. 2d at 278-279). Pointing to the rationale of this Court's decision in *Smith v. California,* 361 U.S. 147, Chief Judge Fuld stated (18 N.Y. 2d 279):

> ". . . This rationale would seem to be equally applicable to *scienter* as to age when the youth of the buyer is an element of the crime. Absolute liability without regard to whether the bookseller was put on notice that his customer was under age would necessarily restrict and curtail the distribution of literature to adults, particularly women, whose youthful appearance belied mature years. In its efforts to protect children, the State is not privileged to so hinder the flow of information and ideas."

With deference, it is submitted that the angle of vision by Judge Keating was too restricted. The issue is not merely one involving a bookseller but the right of the community, both young and old, to access to constitutionally protected material. If a bookseller, or distributor, or publisher, is to be held strictly liable for the sale of books or magazines to minors, reason dictates that such a person will steer clear of the forbidden zone and simply refuse to publish, distribute or sell any material which may possibly fall into the hands of a person under the age of eighteen years.

Moreover, as a matter of due process of law, it must be recalled that the concept of *mens rea,* the guilty mind, expresses the notion that it is not conduct alone but conduct accompained by a guilty mental state which concerns the law. One who sells a book or magazine to

a person honestly believing that he or she is over the age of eighteen cannot reasonably be said to be acting with a criminal intent. At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act has always been held to be a good defense. It is therefore doubtful that the statute herein is valid even under ordinary criminal law principles. Moreover, the assumption that the age of a person can be easily perceived today by the "eye of experience" appears unsupported by the facts of life. See, *People v. Hernandez*, 61 Cal. 2d 529, 393 P. 2d 673, 39 Cal. Rptr. 361 (1964).

However, we do not deal here with the sale of liquor or cigarettes to minors. Unlike liquor and cigarettes, questions revolving around books, magazines, films and other media of communication implicate First Amendment questions, and ordinary rules of criminal law cannot be sweepingly applied in the First Amendment area. It is a serious constitutional error, it is submitted, to believe that the talismanic label of "sale to minors" can be used to justify the imposition of principles of strict liability in the free speech and press area where the resultant self-censorship can being about the suppression of materials in the areas of literature and art protected by the First Amendment. *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Freedman v. Maryland*, 380 U.S. 51.

The issue is one of substantial importance which this Court should decide.[7]

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[7]Issues of scienter were left undecided in *Redrup v. New York*, 386 U.S. 767.

4. The record is barren of any proof of the essential ingredients of the alleged offense. It is of course now well established that it is a violation of due process to convict and punish a man without evidence of his guilt. *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Shuttlesworth v. Birmingham,* 382 U.S. 87, 93-95.

The statute provides that "knowingly" means having knowledge of the character and content of any item described in the law, or failure to exercise reasonable inspection which would disclose the character and content of the item. In the light of constitutional requirements, appellant construes this provision to mean that the burden is on the prosecution under the law to prove beyond a reasonable doubt that the accused knew the contents of the particular material involved and knew that the material came within the prescribed definitions contained in the law and appealed to the lust of persons under the age of eighteen years, or to their curiosity as to sex or to the anatomical differences between the sexes. Proof of a mere negligent failure to discover these factors would not be sufficient to satisfy constitutional standards. See, *Smith v. California,* 361 U.S 147; *Freedman v. Maryland,* 380 U.S. 51; *Speiser v. Randall,* 357 U.S. 513; *Elfbrandt v. Russell,* 384 U.S. 11; *Keyishian v. Board of Regents,* 385 U.S. 589; *New York Times Co. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisana,* 379 U.S: 64.

It is unnecessary, it is submitted, to develop the aforesaid conclusions in the light of the record made herein. In whatever manner the State may construe the standards for scienter imposed by the statute, no effort was made to prove guilty knowledge on the part of appel-

lant. This was of course the view of Judge Markowitz dissenting in the court below (Appendix B). As Judge Markowitz noted, the record reflected only the purchase of the magazines in five to ten seconds, without any conversation or statement by the appellant. The purchaser was only in the store for three or four minutes. There was simply no proof, direct or indirect, of this essential element of the alleged offense. Clearly, the strict constitutional standards affecting the adequacy of proof needed to make out a case of "criminal speech" were not met. *Edwards v. South Carolina,* 372 U.S. 229; *Wood v. Georgia,* 370 U.S. 375; *New York Times Co. v. Sullivan,* 376 U.S. 254; *Elfbrandt v. Russell,* 384 U.S. 11.

In one other respect the record is barren of proof of an essential element of the alleged offense. The statute makes punishable only the sale of the material defined in the statute which appeals to the lust of persons under the age of eighteen years, or to their curiosity as to sex or to the anatomical differences between the sexes. There was no proof offered in support of these essential elements of the alleged offense. The only proof in the record is the fact that the two magazines were sold. A procedure which permits suppression and punishment, without proof of the essential ingredients of the offense, undermines the due process and free speech and press guarantees of the First and Fourteenth Amendments. In the area of the circulation of the press and the access of the public to constitutionally protected material, a state procedure which relieves the prosecution of the burden of proving that speech or press is criminal opens the door wide for wholesale suppression. See, *Speiser v. Randall,* 357 U.S. 513; *New York*

Times Co. v. Sullivan, 376 U.S. 254; *Freedman v. Maryland,* 380 U.S. 51; *Jacobellis v. Ohio,* 378 U.S. 184; *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965); *Dunn v. Maryland State Board of Censors,* 240 Md. 249, 213 A. 2d 751 (1965); *United States v. Nardone,* D.C. Court of General Sessions, Crim. Div. Nos. US-5156-65 *et seq.* (7/7/66), unreported, annexed hereto as Appendix G.

Conclusion.

It is submitted that the questions presented by this appeal are substantial and of public importance, requiring review by the Court.

Respectfully submitted,

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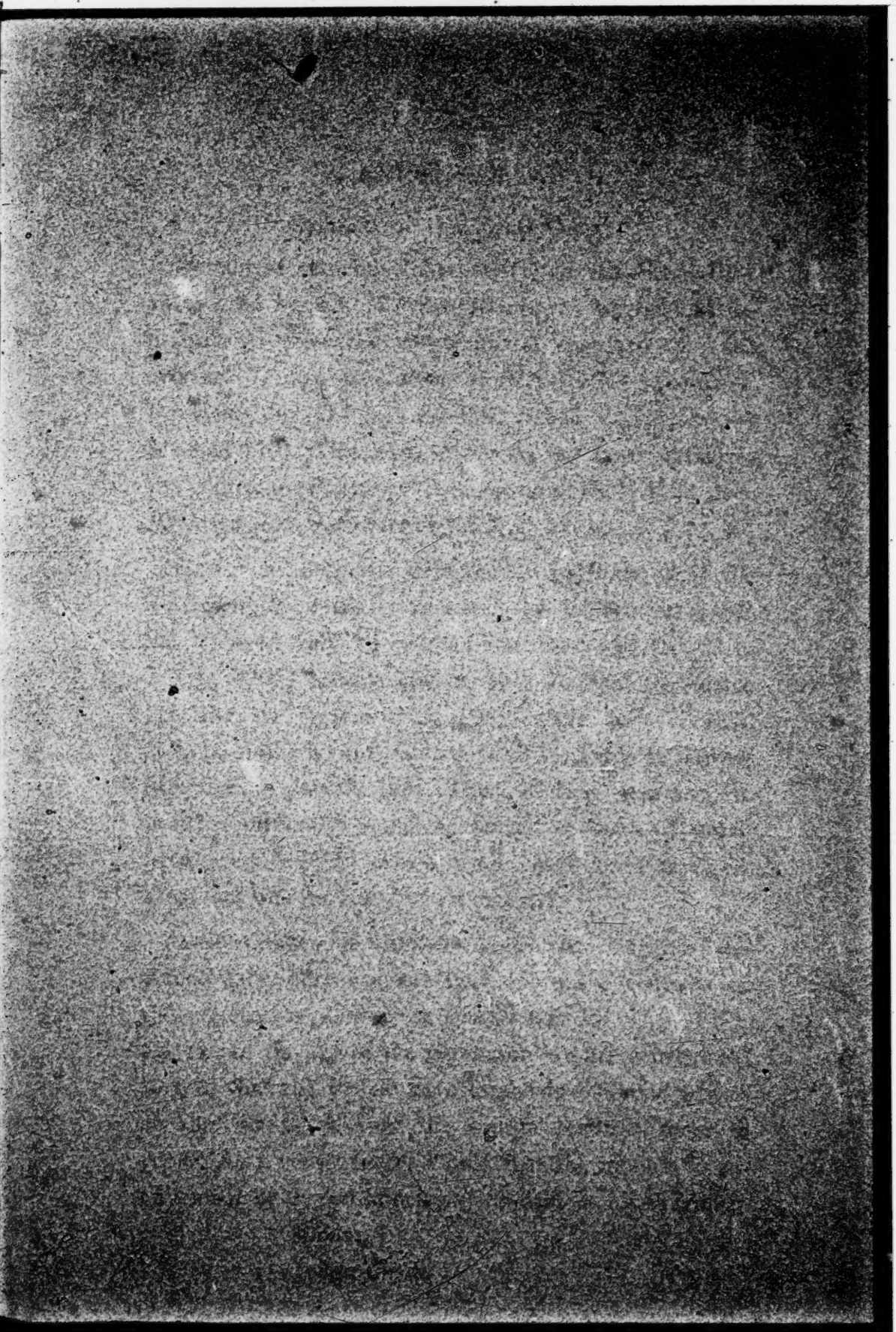
Counsel for Appellant.

Of Counsel:
SAM ROSENWEIN.



APPENDIX A.

Opinion of the Trial Court.

Defendant contends that §484(i) of the Penal Law as enacted by Ch. 372 L. 1965 is too vague and indefinite to meet the constitutional standard of "due process" (*People v. Kahan,* 15 N.Y.2d 311; *People v. Bookcase, Inc.,* 14 N.Y.2d 409; *People v. Kaplan,* 44 Misc.2d 110). This issue, however, has been settled to the contrary (*People v. Tannenbaum,* 18 N.Y.2d 268; *Bookcase, Inc. v. Broderick,* 18 N.Y.2d 71).

So far as concerns defendant's argument that the enactment of §484(h) repealed, by implication §484-(i), it need only be pointed out that §484(h) (Ch. 327 L. 1965) became law on June 7, 1965 to become effective on September 1, 1965, while §484(i) (Ch. 372, L. 1965) became law on June 14, 1965, to become effective on July 1, 1965. Thus, if there was any repeal by implication—and we do not so hold—it would have been §484(h) which would have been repealed, since that was the statute first enacted.

Inasmuch as *Tannenbaum* holds that constitutional standards require scienter only as to the contents of the publication (*Smith v. California,* 361 U.S. 147), and not of the age of the purchaser, we are constrained to hold that the People have established beyond a reasonable doubt, all that the statute requires them to prove. As a consequence, I hold that the motion to acquit must be denied and the defendant is found guilty.

Bloom, J.

Judge Bloom

After trial, the defendant is found Guilty as charged.

L.A.C.

Judge Cioffi

After trial, the defendant is found guilty.

H.B.E.

Judge Evans

APPENDIX B.

Opinion of the Appellate Term, First Department.

Appellate Term, First Department, No. 213 May, 1967
The People of the State of New York, Respondent, against David Rabeck, Defendant-Appellant.

DISSENTING MEMORANDUM

Jacob Markowitz, J.:

While upholding the constitutionality of section 484-i of the Penal Law in People v. Tannenbaum, 18 N Y 2d 268, in a 4 to 3 decision, the Court of Appeals nevertheless stated on page 273:

> "Section 484-i requires *scienter* of obscenity, i.e., some knowledge by the bookseller of the character of the book being sold. This is the constitutional mandate of Smith v. California (361 U.S. 147)".

The record reflects only that the purchaser of the magazines ("Snip" and "Trojan") briefly held them up (5 to 10 seconds) with their names showing and gave to the defendant the exact purchase price. There was no conversation. The record does not indicate whether the store or the defendant was busy at the time of the transaction. This would have been easily discernible at the time of the trial. The trial record does not show whether defendant was the owner, an employee or merely a cashier, the volume of business and the status of defendant relative directly to the opportunity and the interest of the defendant in observing and directing his attention to this particular transaction. These factors also relate to and condition the al-

leged obligation of the defendant who exercised a reasonable inspection which would disclose the nature of the magazines.

There was no proof of knowledge by the defendant to establish scienter. The People have failed to prove a prima facie case.

The conviction should be reversed on the law and the facts and the information dismissed.

APPENDIX C.

Certificate Denying Leave to Appeal.

State of New York, Court of Appeals Before: Hon. Stanley H. Fuld, Chief Judge.

The People of the State of New York, Respondent, against David Rabeck, Defendant-Appellant.

I, Stanley H. Fuld, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to section 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

On this application, the appellant urged (1) that section 484-i of the Penal Law was vague, contrary to the requirements of due process as guaranteed by the Fourteenth Amendment (see *People v. Tannenbaum*, 18 N Y 2d 268) and (2) that the proof of scienter was insufficient under the due process clause of the Fourteenth Amendment.

Dated at New York, New York June 23, 1967.

Stanley H. Fuld
Chief Judge

APPENDIX D.

Judgment of the Appellate Term, First Department.

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 15th day of June 1967.

Present-Hon. Samuel H. Hofstadter *J. P.* Samuel M. Gold, Jacob Markowitz (dissenting) *Justices.*

The People of the State of New York Respondent, vs. David Rabeck, Defendant-Appellant May #213.

Filed June 15, 1967.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of Bronx after trial before Hon. S. Cioffi, Bloom, Evans on the 23rd day of June 1966 upon the charge of violation of §484-1 of the Penal Law and having been sentenced by Hon. S. Skodnick, Shalleck, Phipps (Shalleck, J. dissenting) on the 25th day of January 1967 as follows.

6 months in the Workhouse, execution of sentence suspended, and the said appeal having been heard and due deliberation having been had thereon.

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby affirmed.

Enter.

Justice Appellate Term
Supreme Court, First Department

APPENDIX E.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . . abridging the freedom of speech, or of the press; . . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Laws of New York 1965, Chapter 372; McKinney's Consolidated Laws of New York, Penal Law §484-i, Effective July 1, 1965:

> *§484-i. Sale or delivery of pornographic material to minors under the age of eighteen*
>
> Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:
>
> 1. any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their

curiosity as to sex or to the anatomical differences between the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than a fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act or acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book", pamphlet or magazine, phonograph record, tape or similar electronic

reproduction of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts or masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion,

which details, descriptions or narrative accounts are witten or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological testbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and contention of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional

by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts involved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent.

APPENDIX F.

Laws of New York 1965, Chapter 327; McKinney's Consolidated Laws of New York, Penal Law §484-h, Effective September 1, 1965:

§484-h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual

excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

APPENDIX G.

Opinion of District of Columbia Court of General Sessions, Criminal Division.

United States, Plaintiff v. Nikki M. Nardone, et al., Defendants. Criminal Action Nos. US 5156-65; US 10624-25-65; US 7205-07-65; US 711-12-66; US 1790-66; US 2185-66; US 1099-66; US 1100-66.

In these cases, a number of defendants are charged with violations of D. C. Code § 22-2001, which prohibits obscene and indecent publications and performances. The evidence consists of films, photographs, and a description of performances at the Gayety Theater. There was also testimony concerning the conditions surrounding the sales and exhibitions.

Ever since *Roth v. United States,* 354 U.S. 476 (1957), the constitutional test of obscenity[1] has been whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appears to the prurient interest. This test was reaffirmed in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), and most recently in *Ginzburg v. United States,* .... U.S. .... (1966). Under this test, "'three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

[1]The prosecutor conceded during argument that the materials and performances involved in the present cases constitute speech or expression; and that, unless these materials are obscene within the standards laid down by the Supreme Court, they are protected by the First Amendment.

and (c) the material is utterly without redeeming social value." *A Book Named "John Cleland's Memoirs of a Women of Pleasure" v. Massachusetts,* .... U.S. .... (1966). Thus, the law is that books, films, photographs, or performances cannot be held to be obscene unless, among other things, they offend against contemporary community standards. Since measuring against a standard is hardly feasible unless that standard is first established, contemporary community standards must, in some way, be brought to the attention of the trier of facts if he is to be able to decide the ultimate question of obscenity.

Yet there was no evidence whatever before the Court on that issue. Despite invitations by the Court, and despite being given a continuance of several weeks for that specific purpose, the prosecution declined to introduce evidence of contemporary community standards, claiming that such evidence was unnecessary.

The authorities cited in support of the government's position are neither conclusive[2] nor persuasive. Other opinions are far better reasoned. See for example, Judge Waterman's dissent[3] in *United States v. Davis,*

[2]In *Kahm v. United States,* 300 F. 2d 78 (C.A. 5, 1962), *cert. denied,* 369 U.S. 859, the issue was whether *expert* testimony was required. It may well be that in some instances opinion evidence can be dispensed with, but what is plainly necessary is some factual basis upon which the trier of facts is able to base a conclusion concerning contemporary community standards. Moreover, the *Kahm* court did not properly distinguish between the prurient interest factor and the community standards issue. See note 7 *infra.* As for *A Quantity of Brooks v. Kansas,* 379 P. 2d 254 (Kan. 1963), not only is there nothing in the opinion which deals with the problem here under discussion, but the Kansas Supreme Court decision was actually reversed by the U. S. Supreme Court. 378 U.S. 205 (1964).

[3]The majority decided *Davis* on the basis of what is considered to be a trial stipulation that no evidence of community standards was required. It did not disclose its view of the law absent such a stipulation.

353 F. 2d 614 (C.A. 2, 1965);[4] and see also, *United States v. Klaw*, 350 F. 2d 155 (C.A. 2, 1965); and *A Book Named "John Cleland's Memoirs of a Women of Pleasure" v. Massachusetts*, ... U.S. .... (1966) (Mr. Justice Douglas, concurring).

The government suggests that the Court may infer contemporary community standards by the method of judicial notice or by relying upon its own general feeling about the matter.

Knowledge of contemporary community standards can no more be said to be available to the trier of facts on a judicial notice basis than knowledge of the myriads of other facts which must normally be proved in an evidentiary way during the course of litigation. This is so especially if the standards by which the material must be judged are those of the nation rather than those of a particular locality. Mr. Justice Brennan stated in *Jacobellis v. Ohio, supra*, that the standard is a national one, and while the issue has not been squarely decided one way or the other, the Brennan view clearly represents the soundest approach, which this Court adopts as its own.[5]

It is conceivable that which respect to so-called "hard-core pornography" the deviation from contemporary community standards can be the subject of judicial

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[4]Judge Waterman said (353 F. 2d at 616-17): "I am not persuaded that, without some evidence other than the records and labels and each juror's personal reaction thereto, a jury can accurately express in the light of national community standards the level of national community tolerance."

[5]We are dealing here with a constitutional question, and the answer must therefore be the same wherever the Constitution applies. Local mores can no more dictate the constitutional standard of obscenity than they can supply a standard with respect to racial discrimination or segregation.

notice. But the materials involved in these cases are not such that their deviation from the national level of tolerance is commonly known or capable of certain verification. For example, counsel for the defendants suggested during oral argument that bare-breasted performances are commonly accepted in most large cities, a statement with which the prosecutor did not agree. Whatever may be the truth concerning the defense statement, and whatever may be the impact of the true facts upon the ultimate decision regarding national standards, this controversy clearly illustrates that the contemporary community standard is not so certain or so easily verifiable as to be capable of being judicially noticed without the benefit of evidence.

This Court, of course, has its own personal standards; it also has a general opinion regarding community standards, at least those in the locality. But the Court's private views and opinions are not, and should not be, determinative. As Mr. Justice Frankfurter said in his concurring opinion in *Smith v. California*, 361 U.S. 147, 165 (1959) ". . . the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience in life, but on the basis of 'contemporary community standards.'"

To proceed on the assumption that the trier of facts —particularly a judge sitting without a jury—should decide on the guilt of an accused in a criminal case on the basis of his personal opinion concerning the acceptability of a certain film, book, or performance, without having heard any evidence whatever on the question, is to substitute judicial censorship for censorship by the police. Censorship—particularly censorship

unfettered by any restraints or safeguards[6]—is a repugnant to the First Amendment, whether the censor wears a uniform or a robe.

When evidence on contemporary community standards is supplied, the judge can decide the case in the customary judicial manner, based upon that evidence. But when there is no evidence[7] on the critical issue, the judge could reach a decision only by relying upon his own predilections and prejudices. When a judge condemns without evidence he is acting not as a court of law but as a censor. I decline to accept that role which the government would thrust upon me.

In free speech cases, the burden is always on the prosecution to demonstrate the applicability of an exception to the reach of the First Amendment. Moreover, since this is a criminal case, the burden is again on the prosecution to prove every element of the offense.[8] Yet, as indicated, the prosecution declined the invitation to produce testimony on contemporary community standards, possibly out of the feeling that the collection of this kind of evidence in misdemeanor cases was not worth its while. But if cases are of sufficient importance to be tried, they are of sufficient

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[6]When there is no evidence, there is nothing for an appellate tribunal to review, unless the appellate judges were to substitute their personal opinions for the personal opinion of the trial judge.

[7]In that respect, the community standards question is unlike the prurient appeal question. Conceivably that question could be decided on the basis of the physical evidence alone.

[8]D. C. Code § 22-2001 requires proof that the particular matter is obscene. Material cannot be said to be obscene unless it is shown to depart from contemporary community standards. Thus, the statute no less than the Constitution makes departure from standards of community tolerance an integral part of the offense.

importance to be tried in accordance with law. This Court firmly intends to enforce adherence to that standard.

The responsibility for the absence of evidence on the critical issue is squarely the government's,[9] and the Court has no alternative to a dismissal of the charges.

The defendants will be acquitted. It should be understood, however, that the Court expresses no opinion beyond the conclusion that the prosecution failed in these cases to prove a vital element of the offenses.

/s/ Harold H. Greene

Judge

July 7, 1966.

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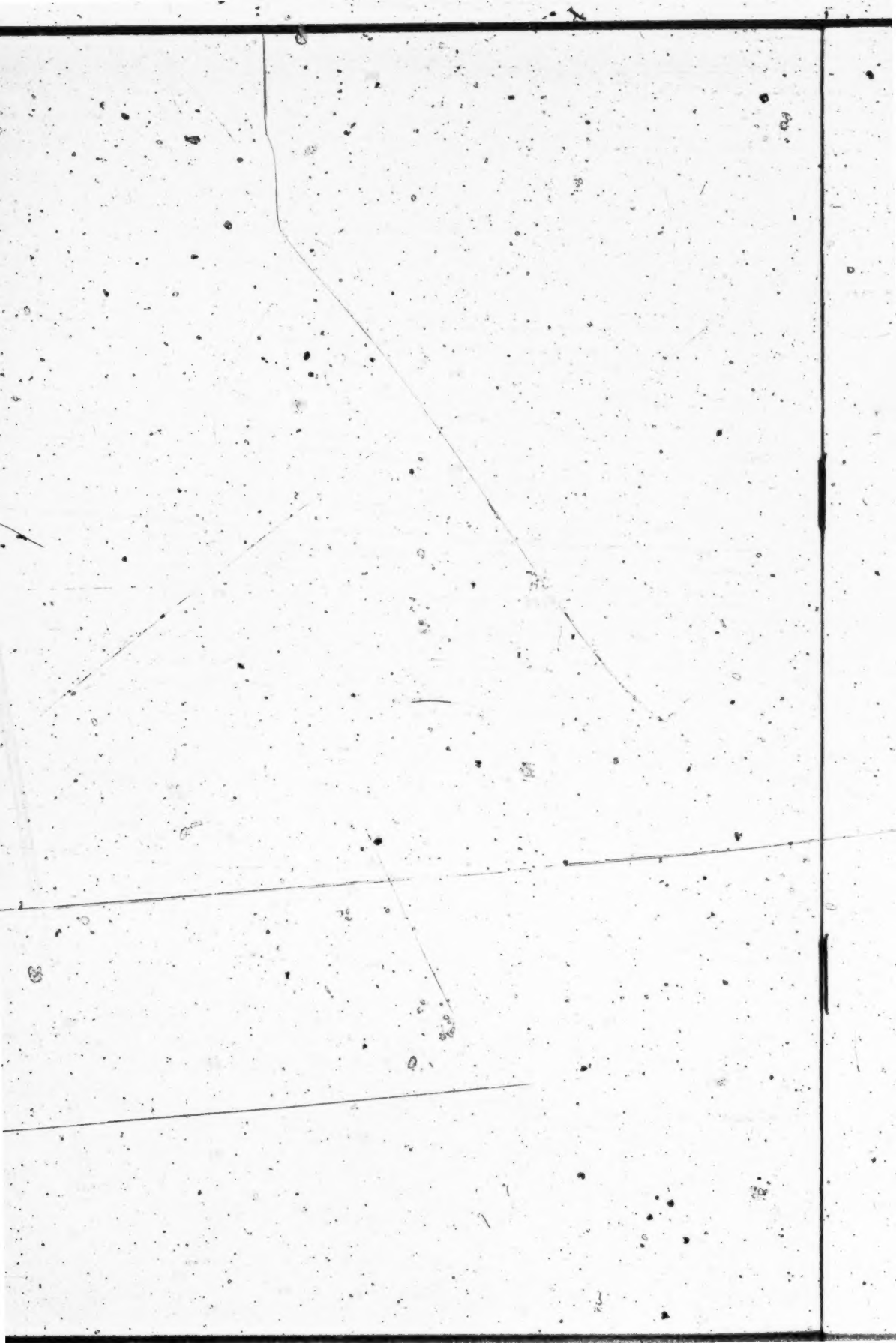
[9]Defense counsel stated that he would be prepared to offer evidence on the community standards issue if the prosecution proceeded to do so.



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IN THE

Supreme Court of the United States

October Term, 1967

No. 611

DAVID RABECK,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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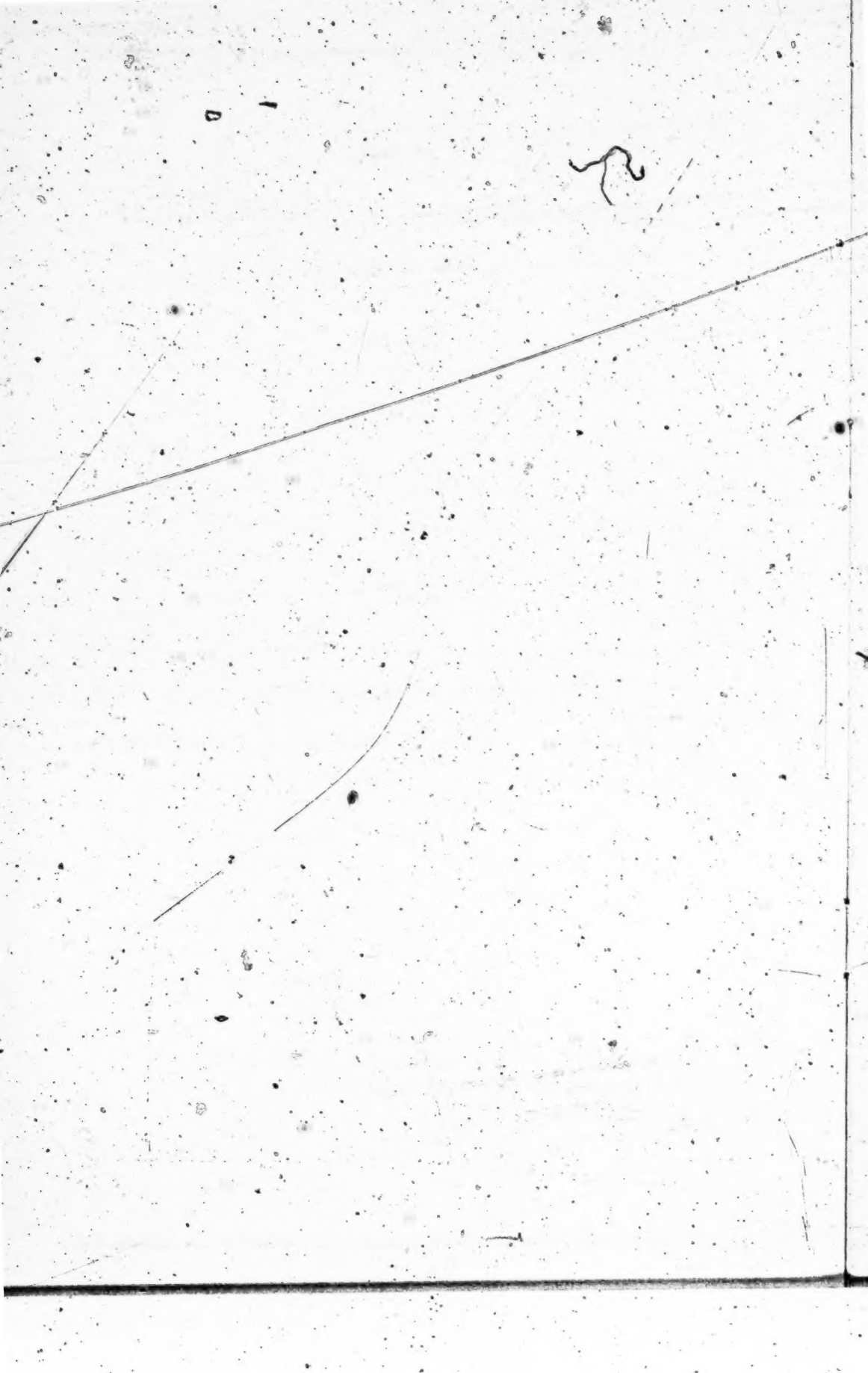

IN THE

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DAVID RABECK,

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MOTION TO DISMISS OR AFFIRM

Appellee in the above entitled case moves to dismiss or affirm on the grounds that the question presented is wholly insubstantial.

As the appellant's jurisdictional statement poses it, the only question presented for all practical purposes concerns the constitutionality of former New York Penal Law Section 484(i), upheld by a divided Court of Appeals [*People* v. *Tannenbaum*, 18 N.Y. 2d 268 (1966), appeal dismissed 388 U. S. 439, 87 S.Ct. 2107 (1967)]. That question is now utterly without importance or significance because, on Sep-

tember 1, 1967, the entire Penal Law of New York went out of existence, repealed by a revised Penal Law which took effect on that date.

The Penal Law as it existed prior to September 1st, proscribed the sale and distribution to minors of salacious materials by Sections 484(h) and 484(i). The New York Court of Appeals, in their opinion in *Tannenbaum*, noted the dual provisions in New York law on the same subject, and while the majority upheld §484(i), the entire Court appeared to favor the formulation of §484(h).

However, Section 484(i) has not been perpetuated in the new law. Instead, the substance of the old Section 484(h) was re-enacted, at which time there were also enacted provisions making it an affirmative defense that the defendant had reasonable cause to believe that the minor involved was seventeen years old or more, or that such minor had offered certain specified proofs purporting to establish that he was of lawful age (Penal Law, §§235.00 *et seq.*).

On June 12, 1967, this Court noted probable jurisdiction in a case wherein the constitutionality of the old §484(h) was challenged, as a result of which action it now appears that this Court has already a vehicle for resolving the issues sought to be presented herein [see *Ginsberg* v. *New York*, October, 1966, No. 1022, 388 U. S. 904, 87 S.Ct. 2108].

Under those circumstances, the instant case hardly presents a question of sufficient importance for this Court to hear or determine; it has no importance for New York, which has already revised its statutory scheme, and because of the peculiar framing of the pertinent statute, little if any importance for other jurisdictions.

Furthermore, while we are not unmindful of the views expressed by the dissenting members of this Court in *Tannenbaum*, we respectfully submit that for Mr. Rabeck, the case is of minor importance. Indicative is the fact that he makes no effort now to demonstrate that his present exposure to a reconsideration of the sentence—a six-month jail term, execution of which was suspended [N.Y. Code Crim. Proc., §470-a]—is anything more than a theoretical threat. Similarly, no effort presently is made by Mr. Rabeck to show that collateral disabilities will result from his conviction.

WHEREFORE, it is respectfully prayed that the appeal be dismissed or the judgment summarily affirmed.

Respectfully submitted,

ISIDORE DOLLINGER
District Attorney
Bronx County
Attorney for Appellee

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel

Dated: Bronx, N. Y.
October, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

RABECK *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 611. Decided May 27, 1968.

PER CURIAM.

Appellant, in seeking reversal of his conviction for selling "girlie" magazines to a minor under 18 years of age in violation of former § 484–i, New York Penal Law,* argues among other grounds that the statute is impermissibly vague. We agree. While we rejected a like claim as to § 484–h in *Ginsberg* v. *New York*, — U. S. —, § 484–i in part prohibited the sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . . ." That standard in our view is unconstitutionally vague. "Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Interstate Circuit, Inc.* v. *City of Dallas*, — U. S. —, —.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, would reverse for the reasons stated in his dis-

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*Section 484–i was repealed by N. Y. L. 1967, c. 791. See *Ginsberg* v. *New York*, — U. S. —, —, n. 1.

senting opinion in *Ginsberg* v. *New York*, — U. S. —, —.

MR. JUSTICE HARLAN would affirm the judgment of the state court on the premises stated in his dissenting opinion in *Interstate Circuit, Inc.* v. *City of Dallas*, — U. S. —, —. In addition, he considers it a particularly fruitless judicial act to strike down on the score of vagueness a state statute which has already been repealed.